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SUPREME COURT U.S.

Supreme Court of the United States

OCTOBER TERM, 1948.

No. 512

BENEFICIAL INDUSTRIAL LOAN CORPORATION,

Petitioner,

against

Honorable WILLIAM F. SMITH, a Judge of the United States District Court for the District of New Jersey; and HANNAH COHEN, Executrix of the Estate of Sol Cohen, deceased, and DAVID F. COHEN, Interveners,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

JOHN M. HARLAN,
CHARLES DANZIG,
Counsel for Petitioner.

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Petitioner Beneficial Industrial Loan Corporation respectfully prays that in the event that this Court should grant the petition for certiorari in the case of *Cohen* v. *Beneficial Industrial Loan Corporation*, No. 442, October Term, 1948, submitted simultaneously herewith, a writ of certiorari issue to the United States Court of Appeals for the Third Circuit, to review a final judgment of said Court in a case entitled *Beneficial Industrial Loan Corporation, Petitioner, and Hannah Cohen, Executrix of the Estate of Sol Cohen, deceased, and David F. Cohen, Interveners* v. *Hon. William F. Smith.*

Opinion Below.

The opinion of the Court of Appeals is reported in 170 F. (2d) 44 and is printed on pages 40-61 of the Record in No. 442.

Statutes Involved.

Section 262 of the Judicial Code (36 Stat. 1162, 28 U. S. C. §377) provided as follows:

> "The Supreme Court and the district courts shall have power to issue writs of scire facias. The Supreme Court, the circuit courts of appeals, and the district courts shall have power to issue all writs not specifically provided for by statute, which may be necessary for the exercise of their respective jurisdictions, and agreeable to the usages and principles of law."

In the 1948 revision of Title 28 of the United States Code, this provision is found in 28 U. S. C. §1651(a), which reads as follows:

> "The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions agreeable to the usages and principles of law."

Statement of Matter Involved.

This petition is in the nature of a cross-petition to the petition in *Cohen v. Beneficial Industrial Loan Corporation*, No. 442, October Term, 1948, to bring before this Court a certain point not raised in No. 442. As will be shown immediately, this point will be reached for consideration by this Court only in the event that the petition for certiorari in

No. 442 is granted and that this Court should hold on the merits that the order of the District Court, which was reversed on appeal by the Court of Appeals for the Third Circuit, was not directly appealable.

Since the background of this case has been set forth on pages 3-5 of our brief in opposition to the petition in No. 442, we shall limit this statement to the additional point raised by this petition.

As appears from the opinion of the Court of Appeals (R. 43 in No. 442), petitioner Beneficial Industrial Loan Corporation appealed from the order of the District Court denying its motion under Chapter 131 of the New Jersey Laws of 1945, since it seemed clear that the order was a final appealable decision, and the Court of Appeals so held. However, in view of the fact that the New Jersey statute was new and had at that time never been the subject of appellate review in the federal courts, the petitioner in the alternative filed in the Court of Appeals a petition for a writ of certiorari or a writ of mandamus (R. 2-9), in order to protect its right to appellate review in the event that the Court of Appeals should hold the order not to be appealable.

The Court of Appeals held the order of the District Court to be appealable, and consequently entered a decree dismissing the petition for the writs (R. 43).

The petition in No. 442 seeks, among other things, a review by this Court of the holding by the Court of Appeals that the order of the District Court was subject to direct appeal. It follows that in the event that this Court should grant the petition in No. 442, petitioner Beneficial Industrial Loan Corporation would be faced by the same necessity for an alternative protection of its rights as in the court below. While believing that the decision of the court below was correct, petitioner desires to protect its right

to appellate review of the order of the District Court in the event that this Court should hold that the order was not appealable. In that event only, it seeks by this petition review of the decree of the Court of Appeals dismissing its petition for mandamus or certiorari.

Jurisdiction.

The jurisdiction of this Court is invoked under 28 U. S. C. §1254(1). The decree of the Court of Appeals dismissing the petition for a writ of certiorari or a writ of mandamus was entered on September 22, 1948 (R. 43). By order dated December 10, 1948, Mr. Justice Burton has extended the time for filing this petition to and including January 15, 1949 (R. 44).

Question Presented.

If the order of the District Court was not directly appealable, was it reviewable by writ of mandamus or writ of certiorari?

Reasons Relied on for the Allowance of the Writ.

1. The instant petition performs the function of a cross-petition to No. 442 and merely seeks to bring before this Court an aspect of the decision of the court below which has not been raised by the petitioners in No. 442. The decision of the court below as to review by common law writ was inextricably intertwined with its decision on appealability, and one was dependent upon the other. Therefore, if this Court should grant the petition in No. 442, this cross-petition should likewise be granted so that the entire question of the reviewability of the order of the District

Court may be determined by this Court and the corporate petitioner may obtain relief from a possible prejudicial error of the court below.

2. The dismissal of the petition for mandamus or certiorari by the court below was clearly erroneous, if the order of the District Court was not directly appealable.

(a) The dismissal was based on the ground that the order was appealable, the court saying (R. 61 in No. 442):

> "Our decision makes it unnecessary for this court to pass upon Beneficial's application for mandamus or certiorari. Consequently an order will be entered . . . dismissing the petition."

Since the remedy by appeal was adequate, no reason existed for the issuance of a prerogative writ. If this Court should hold that the court below erred as a matter of law in deciding that the order of the District Court was directly appealable, it follows that the dismissal of such petition was based on an error of law.

(b) It is clear that if the order was not appealable, the court below would have granted the petition for the writs, if it had the power to do so. Thus, the court below said in its opinion (R. 44 in No. 442):

> ". . . *without the right to sustain an appeal Beneficial could never gain the security to which it is entitled if the statute is applicable*, for a writ of mandamus could issue from this court only in aid of its appellate jurisdiction. [Citations omitted] If the order of the court below is not appealable we would not have the right to issue the writ since inso far as the instant litigation is concerned this court would have no appellate jurisdiction to protect." (Emphasis supplied.)

The doubt of the court below as to its *power* to review the order of the District Court by common law writ, if the order was not reviewable by *direct* appeal, is clearly unfounded. There can be no doubt as to its power to do so under section 262 of the Judicial Code, which then appeared in 28 U. S. C. §377, but is now found in 28 U. S. C. §1651(a). For the order of the District Court would have been reviewable in any event on appeal from its final judgment. And it is well settled that where, as in this case, such an appeal would be wholly ineffectual, the common law writs may be issued in aid of such potential appellate jurisdiction, before actual appellate jurisdiction has been obtained. *McClellan* v. *Carland*, 217 U. S. 268 (1910); *Ex parte United States*, 287 U. S. 241 (1932).

As shown on pages 8-11 of the brief in opposition to the petition in No. 442, and as recognized by the court below, the order of the District Court is beyond correction after final judgment in the main action and appellate jurisdiction would thus be thwarted if review is postponed until then.

On the basis of such circumstances, this Court in the case of *De Beers Consolidated Mines* v. *United States*, 325 U. S. 212 (1945), granted a common law writ of certiorari to review an interlocutory order of the District Court which restrained the defendants in an anti-trust suit from disposing of any of their property in the United States during the pendency of the action and until their compliance with any decree rendered against them. Mr. Justice Roberts, delivering the opinion of the court, said (at p. 217):

> ". . . no decision of the suit on the merits can redress any injury done by the order; and therefore unless it can be reviewed under §262 it can never be corrected if beyond the power of the court below."

This is precisely the situation here, if the order is held to be interlocutory in character.

Appellate jurisdiction may also properly be protected in the instant case by the issuance of a writ of mandamus. Chapter 131 of the New Jersey Laws of 1945 gives to corporations an absolute right to require a stockholder owning less than the required number of shares to give security for counsel fees and expenses and an absolute right to have recourse therefo in the event that the plaintiff-stockholder is unsuccessful. As the Court of Appeals stated in its opinion, ". . . the wording of R. S. 14:3-15 leaves no discretion in the court below to require security of the plaintiff or the intervener. The only discretion conferred on the court by R. S. 14:3-15 is as to the *amount* of the security and of the subsequent reimbursement" (R. 60, in No. 442). In the instant case, the District Court refused to fix the security to be posted by the plaintiff and intervener, which was its mandatory duty under the statute, and held that it was without jurisdiction to allow counsel fees and expenses. Under these circumstances, mandamus was a proper remedy to direct the District Court to exercise its jurisdiction and to fix the amount of security as required by the statute.

A case directly in point is *Ex parte United States*, 287 U. S. 241 (1932). There, the District Court had denied the government's petition for a bench warrant for the arrest of a person duly indicted by the grand jury. This Court granted mandamus to review the order, saying (at p. 249):

> "The theory of the court below is that its denial of the petition of the government for a bench warrant was an exercise of its judicial discretion, and, therefore, not reviewable by mandamus. This view of the matter cannot be sustained. The question whether there was probable cause for putting the

accused on trial was for the grand jury to determine, and the indictment being fair on its face, the court to which it was returned, upon the application of the United States attorney, should have issued the warrant as a matter of course."

Here, likewise, the District Court had no discretion in the matter, but should have ordered the posting of security by the plaintiff and intervener "as a matter of course", and its failure to do so, if not appealable, should have been corrected by the Court of Appeals in the exercise of the powers conferred upon it by 28 U. S. C. § 1651(a).

WHEREFORE, it is respectfully submitted that this cross-petition for certiorari to review the decision of the Court of Appeals dismissing the petition for mandamus or certiorari should be granted, in the event that this Court should grant the petition in No. 442.

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